

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of the Middle Class Tax Relief)	CG Docket No. 12-129
And Job Creation Act of 2012)	
)	
Establishment of a Public Safety Answering Point)	
Do-Not-Call Registry)	
)	

COMMENTS OF ACA INTERNATIONAL

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ACA International (“ACA”) respectfully submits the following comments in response to the Notice of Proposed Rulemaking (“NPRM”) issued in the above-referenced docket, adopted on May 21, 2012,¹ in which the Commission seeks comment on the implementation of a Do-Not-Call list for public safety answering point (“PSAP”) numbers. For the reasons described below, ACA supports the application of the Commission’s safe harbor and access rules for the Do-Not-Call Registry as a model for the proposed PSAP Do-Not-Call list’s rules. In addition, while ACA does not agree with the Commission’s interpretation of the definition of an automatic telephone dialing system under the Telephone Consumer Protection Act (“TCPA”),² ACA believes that using a different definition in interpreting “automatic dialing or ‘robocall’ equipment” would cause even further confusion about what equipment is subject to regulatory restrictions on the use of assistive dialing technologies.

I. BACKGROUND

A. ACA International

ACA International is an international trade association originally formed in 1939 and composed of credit and collection companies that provide a wide variety of accounts receivable management services. Headquartered in Minneapolis, Minnesota, ACA represents approximately 5,500 company members, including credit grantors, collection agencies, attorneys, asset buyers, and vendor affiliates.

The company-members of ACA comply with applicable federal and state laws and regulations regarding debt collection, as well as ethical standards and guidelines established by ACA. Specifically, the collection activities of ACA members are regulated primarily by the

¹ *In re Implementation of the Middle Class Tax Relief and Job Creation Act of 2012*, Notice of Proposed Rulemaking, CG Docket No. 12-129, 77 Fed. Reg. 37,362 (June 21, 2012) (hereinafter “NPRM”).

² 47 U.S.C. § 227.

Federal Trade Commission (“FTC”) under the Federal Trade Commission Act,³ the Fair Debt Collection Practices Act (“FDCPA”),⁴ the Fair Credit Reporting Act (as amended by the Fair and Accurate Credit Transactions Act),⁵ and the Gramm-Leach-Bliley Act,⁶ in addition to numerous other federal and state laws. Indeed, the accounts receivable management industry is unique if only because it is one of the few industries in which Congress enacted a specific statute governing all manner of communications with consumers when recovering debts, including those created in the context of healthcare operations.

ACA members range in size from small businesses with a few employees to large, publicly held corporations. Together, ACA members employ in excess of 150,000 workers. These members include the very smallest of businesses that operate within a limited geographic range of a single town, city, or state, and the very largest of national corporations doing business in every state. The majority of ACA members, however, are small businesses. Approximately 2,000 of the company-members maintain fewer than ten employees, and more than 2,500 of the members employ fewer than twenty persons.

As part of the process of attempting to recover outstanding payments, ACA members are an extension of every community’s businesses. ACA members work with these businesses, large and small, to obtain payment for the goods and services received by consumers. In years past, the combined effort of ACA members have resulted in the recovery of billions of dollars annually that are returned to business and reinvested. For example, ACA members recovered and returned over \$44.6 billion in 2011 alone, a massive infusion of money into the national

³ 15 U.S.C. § 45 *et seq.*

⁴ 15 U.S.C. § 1692 *et seq.*

⁵ 15 U.S.C. § 1681 *et seq.*

⁶ 15 U.S.C. § 6801 *et seq.*

economy.⁷ Without an effective collection process, the economic viability of these businesses, and, by extension, the American economy in general, is threatened. Recovering consumer debt enables organizations to survive; helps prevent layoffs; keeps credit, goods, and services available; and reduces the need for tax increases to cover governmental budget shortfalls.⁸ At the very least, Americans are forced to pay higher prices to compensate for uncollected debt.

In 2011, Ernst & Young conducted a study⁹ to measure the various impacts of third-party debt collection on the national and state economies. In addition to recovering and returning \$44.6 billion in 2011, the study found that third-party debt collectors directly provided 148,272 jobs and \$5 billion in payroll. When factoring in jobs created indirectly, those numbers doubled to 302,000 jobs and \$10 billion in payroll. The study also concluded that third-party debt collectors paid \$509 million in state and local taxes and \$495 million in federal taxes. The total state and local tax impact of third-party debt collectors was \$1 billion, and the total federal impact was \$970 million.

B. The TCPA Framework

As noted in the NPRM, the TCPA already includes similar prohibitions to those contained in Section 6507 of the Middle Class Tax Relief and Job Creation Act.¹⁰ The TCPA has two primary sets of requirements that overlap with portions of Section 6507. First, absent certain exceptions, the TCPA prohibits calls to particular types of phone numbers using an “automatic telephone dialing system,” which is defined as “equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number

⁷ Ernst & Young, *The Impact of Third-Party Debt Collection on the National and State Economies*, February, 2012, available at <http://www.acainternational.org/files.aspx?p=/images/21594/2011acaeconomicimpactreport.pdf>.

⁸ *Id.*

⁹ *Id.*

¹⁰ Compare Middle Class Tax Relief and Job Creation Act, Pub. L. No. 112-96 (2012) (hereinafter “Tax Relief Act”) with 47 U.S.C. § 227(b)(1)(A)(i).

generator; and (B) to dial such numbers.”¹¹ Included in this prohibition are calls to “any emergency telephone line (including any ‘911’ line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency).”¹² Calls using automatic telephone dialing systems to wireless phone numbers are also prohibited absent certain exceptions, but a 15-day safe harbor exists for numbers recently ported from wireline to wireless.¹³

Second, the TCPA includes prohibitions on telephone solicitations to numbers on the national Do-Not-Call Registry.¹⁴ Companies placing telephone solicitation calls are required to use a copy of the Do-Not-Call list that is no more than 31 days old, and are generally prohibited from placing calls to numbers on that list. The Do-Not-Call Registry is available both in XML and plain-text format, and both complete lists and change-lists are available for download.¹⁵ As part of the Commission’s enforcement regime, however, the Commission’s Do-Not-Call requirements include a detailed safe harbor provision. Under this safe harbor, a caller will not be found liable for violating the TCPA where it meets the Commission’s five-pronged safe harbor test.¹⁶ The Commission should utilize a comparable safe harbor in implementing the Middle Class Tax Relief and Job Creation Act.

II. THE COMMISSION SHOULD CLOSELY FOLLOW EXISTING REGULATIONS UNDER THE TCPA.

The Commission can fully effectuate the goals of Section 6507’s required Do-Not-Call list while minimizing unnecessary burdens by closely following portions of the TCPA’s Do-Not-

¹¹ 47 U.S.C. § 227(a)(1).

¹² *Id.* § 227(b)(1)(A)(i).

¹³ *See In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 19 F.C.C.R. 19215 (2004).

¹⁴ 47 C.F.R. 64.1200(c)(2).

¹⁵ *See* NPRM ¶ 16 n.37.

¹⁶ 47 C.F.R. 64.1200(c)(2)(i).

Call list model. A similar framework, including a robust safe harbor and providing list access in easy-to-use formats, will be effective in achieving Section 6507's goals because both Section 6507 and the TCPA are aimed at curtailing the problem of telephone lines being tied up by an excessive volume of calls. Indeed, while Section 6507 lacks legislative history, comments from the TCPA's legislative history could apply nearly verbatim.¹⁷ Faced with the same problem, the Commission should adopt a comparable solution.

Utilizing the TCPA's framework will also lower the compliance burden placed on those who rely on assistive dialing technologies to reach consumers. Businesses subject to the PSAP Do-Not-Call list will be able to leverage existing knowledge and solutions from other callers who have implemented processes for complying with the national Do-Not-Call list. The Commission's rules implementing the national Do-Not-Call list are already tested and have proven effective.¹⁸ ACA supports measures by the Commission that will closely follow this existing framework.

A. A Robust Safe Harbor Is Necessary and Appropriate.

With respect to the issues outlined in the NPRM, ACA members face a particular challenge: They frequently rely on information from the original creditor for the contact numbers they call. Thus, when ACA members are given information about an account, they are often provided the contact information the customer supplied when making the original purchase. Errors in the original data could cause problems, such as inadvertent calls to PSAP

¹⁷ See, e.g., S. Rep. No. 102-178, at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969 (discussing "automated calls are placed to lines reserved for emergency purposes" and "tying up all the lines of a business and preventing any outgoing calls"); see also *Ibey v. Taco Bell, Corp.*, 2012 WL 2401972, at *3 (S.D. Cal. 2012) ("The TCPA's statutory and legislative history emphasize that the statute's purpose is to prevent unsolicited automated telemarketing and bulk communications.").

¹⁸ See Federal Trade Commission, *Additional Report to Congress*, at 1 (Dec. 2009) ("Polls show widespread awareness of the Registry and registrations have steadily increased to more than 191 million telephone numbers. Moreover, consumers who have joined the Registry report dramatic reductions in unwanted telemarketing calls.").

numbers. Because of this reliance on third parties, ACA strongly supports the creation of a robust safe harbor for calls to PSAP numbers.

The safe harbor should have the same characteristics as the TCPA's safe harbor for the national Do-Not-Call list. No liability should attach for calls to a PSAP number in the presence of (1) written, established procedures to comply with the PSAP Do-Not-Call list; (2) training for personnel in procedures for complying with the PSAP Do-Not-Call list; (3) a recorded list of telephone numbers that cannot be contacted; (4) a process to prevent calls to numbers on the PSAP Do-Not-Call list, using a list no more than 31 days old; and (5) protections against inappropriate use of the PSAP Do-Not-Call list.¹⁹

Structured this way, the safe harbor would appropriately balance the protections for PSAP numbers while minimizing the burdens placed on companies that utilize assistive dialing technologies to contact consumers. For companies that comply with the safe harbor, any inadvertent calls to PSAP numbers will be isolated in nature, rather than a volume of calls sufficient to render PSAP numbers unavailable. While these isolated calls should, of course, be avoided wherever possible, the draconian penalties that Section 6507 mandates should not be imposed when a company satisfies the safe harbor requirements. Furthermore, the 31-day requirement would prevent liability from improperly attaching before a caller has determined that a number has been placed on the PSAP Do-Not-Call list. The national Do-Not-Call list's safe harbor, with its 31-day requirement, prevents such liability by permitting a business to regularly learn of new numbers without imposing an onerous burden of constantly checking for new updates.

¹⁹ See 47 C.F.R. 64.1200(c)(2)(i).

Without a clearly delineated safe harbor, ACA members will be placed in an untenable position. The penalties, as much as \$100,000 per call, are so large that the risk of an inadvertent call to a PSAP number could force ACA members to give up on the use of assistive dialing technologies. These technologies actually help protect PSAPs and other telephone numbers by reducing the mistakes inherent in manual dialing and providing automated means of complying with time of day restrictions and other regulatory requirements. The Commission should encourage the use of these technologies, and a robust safe harbor does just that.

The Commission has authority to create such a safe harbor under Section 6507. Every version of a Do-Not-Call list, whether company specific or nationwide, and whether implemented by the FTC or the Commission, has included such a safe harbor.²⁰ Against this regulatory backdrop, Congress's decision to require the use of a Do-Not-Call list for PSAPs suggests a similar intent for the agency to create a safe harbor.²¹ This interpretation is reinforced by the fact that Congress directed the Commission to consider Section 6507 "part of the Communications Act of 1934," where such safe harbors already exist under the TCPA's similar rules.²² The implementation of a safe harbor would thus represent a reasonable agency action aimed at focusing the Commission's resources on egregious violations of the PSAP Do-Not-Call list, rather than on inadvertent calls.

B. The PSAP Do-Not-Call Database Must Be Easy To Access.

After the creation of the PSAP Do-Not-Call database, those who use dialing technologies will need to consistently access the database in order to ensure that they comply with the

²⁰ See 47 C.F.R. § 64.1200(c)(2)(i); 16 C.F.R. 310.4(b)(2); *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report & Order, 7 F.C.C.R. 8752, 8767 (1992)

²¹ See *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").

²² See Tax Relief Act § 6003.

Commission's rules.²³ Thus, the PSAP Do-Not-Call database should be capable of providing timely responses to requests for data. ACA supports the use of the FTC's access procedures for the national Do-Not-Call database with respect to the PSAP Do-Not-Call database.

As the Commission notes, the FTC's Do-Not-Call database is available in a variety of formats and both as change-lists and full lists. Continuity in the format of data would be beneficial in helping ensure that companies comply with the Commission's new rules. If the data from the two lists is provided in the same format, then existing software will be able to easily incorporate the second list.

C. The Commission Should Use The TCPA's Definition Of "Automatic Telephone Dialing System."

The Commission can further reduce the burdens on businesses seeking to comply with its new PSAP Do-Not-Call list by ensuring that minor technological differences do not subject calls to different rules. As discussed above, the TCPA imposes a variety of requirements on calls made with automatic telephone dialing systems. Under Section 6507, the Commission is to impose new requirements on "automatic dialing or 'robocall' equipment."²⁴ Rather than force businesses that use dialing technology to determine whether such equipment falls under the TCPA rules, the PSAP rules, or both, the Commission should simply import the definition of "automatic telephone dialing system" from the TCPA.²⁵

²³ As noted above, in the absence of a safe-harbor, instantaneous access and queries would be required.

²⁴ Tax Relief Act, § 6507(b)(5).

²⁵ To be sure, ACA disagrees with the Commission's broadening of the definition of "automatic telephone dialing system" in its 2003 TCPA Order. See ACA International, Inc., *Petition for Reconsideration and Clarification of Final Rule Implementing Amendments to the Telephone Consumer Protection Act* (Aug. 23, 2003). Unlike the TCPA, the text of Section 6507 does not include an explicit requirement of random or sequential number generation. Compare 47 U.S.C. § 227(a)(1) with Tax Relief Act, § 6507(b)(5). Nonetheless, because using different definitions for the TCPA and Section 6507 would impose greater burdens on entities using assistive dialing technologies, ACA supports the Commission's proposal to use the TCPA's definition of "automatic telephone dialing system" in its implementation of Section 6507.

III. PENALTIES SHOULD NOT BE IMPOSED FOR ISOLATED CONDUCT.

For the same reasons that ACA supports the creation of a clearly defined safe harbor, ACA supports the Commission's proposal to continue its existing policy of issuing a citation to non-licensees prior to assessing liability.²⁶ Because non-licensees may not have a reason to suspect the Commission's rules apply to them, these entities may not have the necessary notice for a proper imposition of a fine.²⁷ Considering the extremely high fine levels mandated under Section 6507, issuance of a citation to non-licensees is all the more appropriate.

As the Commission explained, the statutory text contains ample support for this approach. First, the Commission is directed to enforce Section 6507 as if it were "part of the Communications Act of 1934."²⁸ Second, Section 6507 directs the Commission to consider whether a violation is a first or subsequent offense in determining a fine.²⁹ Finally, Section 6507 directs the Commission to consider the willfulness (or lack thereof) in determining whether to impose a fine.

IV. THE COMMISSION SHOULD TAKE STEPS TO ENSURE THE ACCURACY OF THE DATABASE.

Because liability under Section 6507 is based on whether a number is on the PSAP Do-Not-Call list, not based on whether the number truly corresponds to a PSAP, the Commission must be careful to avoid improper registration of numbers.

To prevent abuse of the PSAP Do-Not-Call list, the Commission should require that an entity registering a number affirm, under penalty of law, that the registered number is expressly

²⁶ See NPRM ¶ 23.

²⁷ See *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. . . . [R]egulated parties should know what is required of them so they may act accordingly." (internal citations omitted)).

²⁸ Tax Relief Act § 6003.

²⁹ *Id.* § 6507(c)(3).

used for the operation of a PSAP and will not be used for any other purpose. In addition, those registering PSAP numbers should be required to provide identifying information, including a name, telephone number, and email address. These rules will provide the Commission with greater confidence that a number has been properly placed on the PSAP Do-Not-Call list.

These requirements parallel the proposed certification required of those who wish to access the PSAP Do-Not-Call list before placing calls using assistive dialing technologies.³⁰ The Commission has proposed that these entities provide a certification that an entity is not accessing the list for any other purpose, and to provide certain biographical information, including contact information. Just as those requirements will assist the Commission in preventing improper disclosure of the PSAP Do-Not-Call list, certification requirements necessary to place a number on the list will assist the Commission in meeting its obligations to create an accurate database, and to regularly update the database to account for changes in number assignments.

V. CONCLUSION

The work of debt collectors is vitally important to the economic health of U.S. businesses and government. Collectors create jobs, pay taxes, and recover debt on behalf of the public and private sector. ACA, and its members, support only the legitimate, legal collection of consumer debt, done respectfully and in compliance with federal and state law. ACA will continue to collaborate with state and federal lawmakers and regulators to ensure that appropriate balances are struck, such as protecting PSAPs without burdening the use of assistive dialing technologies.

As the Commission has recognized, the TCPA already protects emergency numbers from calls using automatic telephone dialing systems. The Commission should ensure that its new rules do not unduly burden users of assistive dialing technologies, and do not create obligations

³⁰ See NPRM ¶ 15.

that are inconsistent with the TCPA. Accordingly, ACA supports the use of the existing Do-Not-Call Registry as a model for the PSAP Do-Not-Call database.

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